LIBRARY

Office-Supreme Court, U.S.
FILED
MAR 28 1963
JOHN F. DAVIS, CLERK

No. 756

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

---

ORION T. WHITING, JR., AND LUCRETIA KILLINGS,
*Petitioners*

v.

UNITED STATES OF AMERICA,
*Respondent*

---

## PETITION FOR RECONSIDERATION OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

---

T. EMMETT MCKENZIE,
412 Fifth St., N.W.,
Washington, D. C.,
*Counsel for Petitioners.*

WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON 1, D. C.

# INDEX


| | Page |
|---|---|
| Factual Statement of matter deemed adequate to support request for reconsideration | 1-7 |
| CONCLUSION | 7 |


## CASES CITED


| | |
|---|---|
| Douglas v. California, No. 34, October Term, 1962 | 5, 6 |
| Draper v. Washington, No. 201, October Term, 1962 | 6 |
| Fay v. Noia, No. 84, October Term, 1962 | 6 |
| Gideon v. Wainwright, No. 155, October Term, 1962 | 6 |
| Lane v. Brown, No. 283, October Term, 1962 | 6 |
| Lehigh Mining and Manufacturing Company v. Kelly, 160 US 327 | 4 |
| Mapp v. Ohio, 367 US 643 | 2, 3 |
| McNutt v. General Motors Corp., 298 US 178 | 4 |
| Texas v. Florida, 306 US 398 | 4 |
| Townsend v. Sain, No. 8, October Term, 1962 | 5 |
| United States v. Sturm, 180 F 2d 413 | 3 |

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

---

No. 756

ORION T. WHITING, JR., AND LUCRETIA KILLINGS,
*Petitioners*

v.

UNITED STATES OF AMERICA,
*Respondent*

---

## PETITION FOR RECONSIDERATION OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

---

*To the Honorables: The Chief Justice and the Associate Justices of the Supreme Court of the United States.*

The petitioners, Orion T. Whiting, Jr., and Lucretia Killings, pray that this Court reconsider its prior decision in this cause and Order that the petition for writ of certiorari be granted.

### BASIS FOR RECONSIDERATION

The text for this application is found at page 6 of the opinion below, as follows:

> Section 2234 (U.S.C.) (18) provides that whoever in executing a search warrant wilfully exceeds his authority or exercises it with undue severity shall be fined not more than $1000 or imprisoned for not more than a year.

This language was deemed properly and legally dispositive of the contention that in execution of the search warrant the federal officers had violated section 3109, title 18, U.S.C. in that while one raider with side arm exposed warned the owner of the house not to respond to the demand for entry his companion demolished a door with a sledge hammer and gained entry by force and violence and without sanction of the warrant.

On page 6 of the opinion below this is said:

> He (meaning a United States Marshal) had identified himself and had given notice of his authority to enter *and had been denied admittance.* (Underscoring supplied).

The record and transcript does not reveal that admittance had been denied—it reveals a breaking with force and violence within 50 to 60 seconds of notice of identity; and entry not refused.

Notwithstanding that law is not a frozen block of statutes, rules, decisions and constitutional limitations, petitioners find it impossible to glean from examination of the authorities set forth by this Court that the constitutional right to be secure in houses, papers and effects may be disregarded, at will, by raiding federal officers with the only protection afforded the suspected citizen the faint and delusory possibility the sovereign violating constitutional guarantees in a determination to obtain evidence might see fit to criminally prosecute its own agent —its own aider and abettor.

In Mapp v Ohio, 367 US 643, 81 S Ct 1684, 6 L ed 2d 1081, 1086, this Court dealing with evidence obtained in violation of constitutional provisions, said, in part:

> * * * the Court * * * clearly stated that use of the seized evidence involved "a denial of the constitutional rights of the accused." * * * It meant, quite simply, that "conviction by means of unlawful seizures and enforced confessions * * * should find no

> sanction in the judgments of the courts * * *," Weeks v United States, supra (232 US at 392), and that such evidence "shall not be used at all". Silverthorne Lumber Co. v United States, supra (251 US at 392).

Punishment of a federal officer violating the commands of Amendment IV., and 18—3109 USC affords the wronged citizen neither protection nor redress; and an attempt to remove Amendment IV., from the Constitution and substitute therefor 18 USC 2234 should be totally abortive ab initio.

In the seventh circuit, 180 F 2d 413, 416—United States v Sturm, a different view was taken supported by citations from this Court, as follows:

> * * * the deprivation of a constitutional right ousts the jurisdiction of the District Court * * * where the violation of a right asserted by the accused bears a causal relationship to his subsequent conviction. Mooney v Holohan, 294 US 103, 55 S Ct 340, 79 L ed 791, 98 ALR 406, (conviction based on testimony known by prosecution to be perjured); Brown v Mississippi, 297 US 278, 56 S Ct 461, 80 L ed 882, (conviction based on estorted confession); Johnson v Zerbst, 304 US 458, 58 S Ct 1019, 82 L ed 1461, 146 ALR 357, (accused denied assistance of counsel); Chambers v Florida, 309 US 227, 60 S Ct 472, 84 L ed 716, (conviction based on coerced confession); McNabb v United States, 318 US 332, 63 S Ct 308, 87 L ed 819, (conviction based on incriminating statements obtained from defendant in unlawful manner.

Certainly enough has been alleged by petitioners to bring into sharp focus the question of jurisdiction—a question which will not supply its own answer, sans any inquiry.

This court has upon many occasions spoken of what's to do when questions of jurisdiction arise whether initially upon trial or later upon appeal.

In Lehigh Mining and Manufacturing Company v Kelly, 160 US 327, 336, 337, 16 S Ct 307, 40 L ed 444, the Court said:

> But when the inquiry involves the jurisdiction of a federal court,—the presumption in every state of a cause (is) that it is without the jurisdiction of a court of the United States, unless the contrary appears from the record.

In Texas v Florida, 59 S Ct 563, 82 L ed 817, 306 US 398, 405, the court said:

> While the exceptions do not challenge the jurisdiction of the Court, the novel character of the questions presented and the duty which rests upon this Court to see to it that the exercise of its powers be confined within the limits prescribed by the Constitution make it incumbent upon us to inquire of our own motion whether the case is one within its jurisdiction.

In McNutt v General Motors Corp. 56 S Ct 780, 80 L ed 1135, 298 US 178, 184, the court said:

> The Act * * *, in placing upon the trial court the duty of enforcing the statutory limitations as to jurisdiction by dismissing or remanding the cause *at any time when the lack of jurisdiction appears*, applied to both actions at law and suits in equity. The trial court is not bound by the pleadings of the parties, but may of its own motion, if led to believe that its jurisdiction is not properly invoked "inquire into the facts as they really exist."

Petitioners argue therefore:

The question of ouster of jurisdiction attendant upon deliberate and violent violation of constitutional privileges and guarantees is present in this cause as a lively and unanswered factor—

That they have a constitutional right to have that question resolved.

It is unfortunate that a nation which devotes so much of its time, energy and wealth in exporting to far away

places its concept of democracy and constitutional liberty is not able to afford every citizen an highest-court review of his complaint of illegal and unconstitutional criminal prosecution by the sovereign; notwithstanding this court cannot possibly command the personnel, time and energy which review of every citizen's case would require.

But by the standards utilized by this Court in determining what cases it will consider of sufficient importance, petitioners believe they should have the writ of certiorari.

In the segregation-desegregation cases the persons affected are many and their problems appear in every part of the nation. But the persons affected are a minority.

The persons subject to oppression by the internal revenue agents are no minority.

They outnumber any other class in society.

The possible effect of illegal revenue agent activities is a clear and present danger upon the liberty and property of all.

In affording alleged communists the opportunity to have their political liberty determined by the court of last resort the court afforded a minority group protection to the end that the majority might learn wherein it might find its protection.

But if petitioners may not have their constitutional guarantees determined by the highest court when beset by eager tax gathers how shall the majority tax payers learn of their rights in case of difference of opinion between collector and payer?

But days ago, this Court in Townsend v Sain, no.8, October Term, 1962, reversed and remanded in a matter which had to do with a conviction dependent upon evidence alleged to have been illegally obtained.

In Douglas v California, no. 34, October Term, 1962, the writ issued where it was asserted failure to appoint

counsel led to a conviction in violation of constitutional principles.

In Fay v Noia, no. 84, October Term, 1962, the writ issued where the pressing allegation of petitioner was a coerced confession and where the Court at p. 7, said in part:

> These are not extravagant expressions. Behind them may be discerned the unceasing contest between personal liberty and government oppression.

In Gideon v Wainwright, No. 155, October Term, 1962, the determining factor was alleged denial of a request by an indigent defendant for appointment of counsel. This Court's regard for due process and for the Bill of Rights there upset a conviction obtained in violation of constitutional guarantees.

In Draper v Washington, no. 201, October Term 1962, a refusal to furnish petitioners with a sufficient transcript of trial proceedings at State expense was deemed a sufficient constitutional infirmity to warrant issuance of the writ.

In Lane v Brown, No. 283, October Term, 1962, denial of a transcript upon attempted appeal from a judgment dismissing a petition for writ of error coram nobis—a collateral proceeding dependent upon a prior criminal conviction—was sufficient to invoke the aid of this court.

Each and every involved due process and the Bill of Rights.

In each and every of the causes the alleged errors were held to properly raise questions relative to lack of jurisdiction where constitutional guarantees had been denied.

Petitioners seeking light and guidance from the decisions and opinions of this Court as of March 18, 1963 cannot escape bewilderment, nor resist making a further effort for relief by certiorari.

Certainly the Hindu segregation of populace into "untouchables" and others has no application to applicants for relief in this Court, no petitioner is *ipso facto* unworthy.

There is no doubt that the Declaration of Independence and the preamble to the Constitution of the United States and the Bill of Rights therein contained have informed the petitioners that in nothing controlled or operated by the federal government need they fear less favored treatment—but they feel that although the promise stands forth very clearly; performance in this instance has failed to keep pace with the promise.

## CONCLUSION

If admitted gun-play in support of a violent breaking and entering into the residence of a citizen, is not enough to warrant a decision from the court of last resort petitioners and their counsel must confess a failure to properly grasp the philosophy and purpose of this court's labors in behalf of justice and constitutional liberty.

The act, the principle, and the effect upon the rights and liberties of the people all join in pleading for review in this cause.

Respectfully submitted,

T. EMMETT MCKENZIE,
412 Fifth St., N.W.,
Washington, D. C.,
*Counsel for Petitioners.*

Counsel for petitioners certifies that this petition is presented in good faith and not for delay.

T. EMMETT MCKENZIE,
*Counsel for Petitioners.*